Briefs with orig. record

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 1119

HENRY ALLEN HILL, PETITIONER,

vs.

THE STATE OF TEXAS

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

PETITION FOR CERTIORARI FILED APRIL 7, 1942.

CERTIORARI GRANTED APRIL 30, 1942.

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 30, 1942.

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IN CRIMINAL DISTRICT COURT No. 2, DALLAS COUNTY, TEXAS, JANUARY TERM, A. D. 1941

No. 6852-B

THE STATE OF TEXAS

vs.

HENRY ALLEN HILL

Bill of Exception No. 1—Filed May 20, 1941

Be It Remembered that at the time the above numbered and entitled cause was called for trial on the 20th day of January 1941, and after the State had announced ready for trial, but before the defendant had announced ready, he timely presented his sworn motion to quash the indictment in this cause as follows.

[Title omitted]

MOTION TO QUASH INDICTMENT

Now comes Henry Allen Hill in the above entitled and numbered cause, and excepts to the indictment herein upon the following grounds, to-wit:

2

Comes now Henry Allen Hill, the defendant in the above entitled and numbered cause, and without waiving the above and foregoing exceptions, but still insisting upon the same, and excepts to the indictment herein upon the following grounds, to-wit:

(1) That the defendant is a negro and is not a member of the White Race, but is a member of the negro or African race, and was in jail in Dallas County, Texas, at the time the grand jury, which returned the indictment herein against him, was impaneled, and at said time personally demanded of the officers who had him in custody that he, the defend-

ant, be given the opportunity to challenge the array of said grand jury upon the grounds that the Grand Jury commissioners who selected said grand jurors denied this defendant due process of law as guaranteed to him under the [fol. 85] Fourteenth Amendment of the Constitution of the United States of America by excluding from said grand jury all negroes and all persons of the negro race, and was by said officers denied such right.

Wherefore, premises considered, this defendant prays the Court to quash the indictment herein for the above good and sufficient reasons.

3

Without waiving the above and foregoing exceptions, but still insisting upon the same, now comes Henry Allen Hill, defendant herein, and excepts to the indictment herein upon the following grounds, to-wit:

(1) Said Dallas County, Texas, the County in which the indictment herein was returned, has a population of approximately 465,000 persons, of whom approximately 121,000 are negroes and members of the negro race, a large number of whom are qualified voters and qualified to serve upon said grand juries; but, notwithstanding such facts, the grand jury which returned the indictment herein against the defendant was composed entirely and completely of members of the White race, and all members of the negro race were excluded from serving upon said grand jury.

(2) Notwithstanding the large number of negroes now residing, and who have, for many years prior hereto, resided in the said Dallas County, and the large number of whom are, and who have for many years prior hereto been, qualified voters and qualified to serve upon grand juries, the grand jury commissioners of said County have failed and refused to name any negroes or members of the negro race on any grand jury panel of Dallas County for such a long period of time that the memory of no living man in [fol. 86] Dallas County runneth to the contrary.

(3) Grand Jury Commissioners and other officers charged with the sacred duty of organizing and impanelling grand

juries in Dallas County have for many years prior hereto discriminated against the negroes and members of the negro race residing in said Dallas County by reason of their said race and excluded them from said grand juries and denied said negroes and members of the negro race, including this defendant, by the Fourteenth Amendment to the Constitution of the United States of America.

Wherefore, premises considered, this defendant prays the Court to quash the indictment herein for the above and foregoing reasons.

4

Because this defendant has been denied the equal protection of the law gu-ranteed to him by the Fourteenth Amendment of the Constitution of the United States, by Section 19 of Articl- 1 of the Constitution of the State of Texas, (Bill of Rights) and Article 338 of the Code of Criminal Procedure of the State of Texas in that the grand jury commissioners of Dallas County, Texas, have arbitrarily and systematically for a period of many years excluded all persons of African descent from serving on the grand jury, or in any event the number of negroes selected by the said grand jury commissioners for service on the grand jury for many years prior to the indictment of the defendant has been so negli*b*ible as in itself to sh*wo* and establish such unlawful discrimination, and that such discrimination was particularly practiced in the selection of the grand jury for this term of this Court in which the indictment [fol. 87] against defendant was returned, by excluding all qualified negro*es* citizens solely because of their race o*f* color and not because such neg*or* citizens lacked the qualifications prescribed for grand jurors in the State of Texas, by Article 339, of the Code of Criminal Procedure of Texas.

Wherefore, premises considered, this defendant moves and prays the Court to quash the indictment herein for each and all of the above and foregoing reasons, and upon each and all of the above foregoing grounds.

Henry Allen Hill (Signed), Defendant; Doss Hardin (Signed), Attorney for defendant.

Duly sworn to by Henry Allen Hill. Jurat omitted in printing.

[fol. 88] Be It Further Remembered That the following evidence was offered by the defendant in support of said motion to quash the indictment as follows:

JAMES O. CHERRY, the first witness called by the defendant, having first been duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Doss Hardin:

My name is James O. Cherry. I live in Dallas County. I have lived in Dallas County for about eighteen years. I am the same James O. Cherry who served on the Grand Jury Commission which selected the Grand Jury which served in this county during the months of October, November and December, 1940.

The procedure we all used in selecting the Grand Jury was that we tried to select the best qualified men in Dallas County to serve on this Grand Jury. The procedure we used in selecting what we thought were the best qualified men to serve on the grand jury was, well; the Judge instructed us, told us to use our judgment in selecting the best men for the Grand Jury, which we did.

We arrived at our conclusion that those whom we did select were the best men available by the fact that we felt that the men we discussed were the best men available.

I knew them personally.

All the Grand Jurors, the Commissioners knew them all personally, the ones each one selected; I mean by that, the men I selected I knew them personally.

All three of you Commissioners selected the ones each knew personally and they made up the Grand Jury.

I do not know whether or not of my knowledge that they [fol. 89] were any negroes on that Grand Jury, but we discussed that.

Yes, we discussed about a negro being put on the grand jury.

I did not select a negro in the Grand Jury, I did not know of one that was qualified.

I did not make any inquiry as to how many negroes in Dallas County who were qualified to serve as Grand Jurors.

I made no such investigation.

Cross-examination.

By Mr. Jimmie MacNicoll:

Judge King gave us our instructions in regard to selecting the Grand Jury.

He did not at that time tell any of the Commissioners to select a negro on the Grand Jury.

No, Sir, he did not.

His exact language was to get the best men in Dallas County that you could.

And, pursuant to those instruction-, I did that.

And I say that it was discussed among the Commissioners about the possibility of finding a good negro to put on the Grand Jury.

And it so happened that I personally, did not know a qualified negro that I though- would make a good grand juror.

That is right. Then it was my conclusion, after studying the matter over, that the white men, I knew perhaps would be better to serve then to get some unknown negro—someone I did not know.

That is right. That never entered into it at all that any of the Commissioners arbitrarily discriminate against the negro race in the selection of this grand jury.

[fol. 90] No one expressed any prejudice agains*g* the negro race during this our discussion about the selection of the Grand Jury.

Re-direct examination.

By Mr. Doss Hardin:

In that discussion about not selecting a negro on the Grand Jury, we did not know *on* one, that was our reason for not doing it—selecting a negro, after that discussion.

Whereupon the counsel for the State, Mr. MacNicoll made the following objection;

By Mr. MacNicoll:

We object to the form of that question; he could state his reason but could not speak for the other Commissioners.

Whereupon the Court remarked:

By the Court:

You can only answer for yourself.

By Mr. Doss Hardin: (Continueing examination)

I thought I had explained that I did not personally know of one.

And I made no investigation to find one.

Mr. O. W. Cox, called by the defendant, having first been duly sworn testified as follows, to-wit:

Direct examination.

By Mr. Doss Hardin:

My naem is O. W. Cox, I live in Oak Cliff in Dallas County.

I have lived in Dallas County for twenty years.

I am the same O. W. Cox who served as one of the Grand Jury Commissioners to select the Grand Jury for October, November and December Term, of this county, 1940.

[fol. 91] The procedure we all used in selecting that grand jury was that we had a list we went over of different people's names that we thought to be qualified for jurors.

Just different people that we three Commissioners knew personally that would be qualified to serve as Grand Jurors.

And that is the way I picked the Grand Jury.

I did not have any negroes on that Grand Jury.

I did not. I did not make any investigation as to whether there were any negroes in Dallas County qualified to serve on that Grand Jury.

We discussed it. Personally I did not know of any myself. I did not know of any personally.

I made no investigation to find out if there were any that were qua-ified. I did not know of any and the other men said they knew of none; It was discussed.

Cross-examination.

By Mr. Jimmie MacNicoll:

Yes, I looked in the City Directory.

We had a city directory and a telephone directory.

I, of course, having alived here twenty years or more, I know, in a casual wasy, some negroes.

I do say that I did discuss the matter of selecting a negro on this grand jury.

Had I know- of a qualified negro voter who possessed the qualifications under the law to serve as a grand juror I would have placed him on the grand jury had I believed he was qualified and considered him a good man capanle of acting as a grand juryor.

It so happended I did not know such a negro.

All the colored people I know are laborers, you know,—doing things like that.

[fol. 92] I do not know which negro could read and write.

Most of them that I know can't.

No, sir. None of the commissioners, during the entire selection of this grand jury, ever express- any kind of character of prejudice against the negro race.

And that was the reason—the reason I have given, that a negro was not selected on this Grand Jury.

That is correct, and not because of any discrimination of any one of the commissioners.

Personally, I do not harbor any prejudice on earth against the negro race.

That is correct, either with respect to placing them on the Grand Jury or as to giving them all of the rights they are entitled to under the law of Texas and the United States.

No, sir, I have nefer opened my mouth expressing any prejudice against the negro race.

I have worked negroes; I understand them.

Re-direct examination.

By Mr. Doss Hardin:

I stated that I knew of a number of negroes—I do not know whether those I am acquainted with possess the necessary qualifications to serve on a Grand Jury.

And I said that I made no investigation as to whether they did or did not.

The negroes I know are just ordinary laborers, workers at odd jobs, and so forth.

I do not know whether they paid their poll-tax or not, or were freeholders or not.

And as Grand Jury Commissioners, in selecting that Grand Jury, I made no investigation to find out about paying poll-tax and things like that.

I made no investigation.

[Vol. 93] Re-cross-examination.

By Mr. Jimmie MacNicoll:

Yes, sir. We carried out in every detail the instruction given us by the Court to get the best men available without respect to race, color or creed.

Mr. Herbert W. Whisenand, called by the defendant, having first been duly sworn, testified as fol-ows, towit:

Direct examination.

By Mr. Doss Hardin:

My name is H. W. Wisenant. I live in Dallas, and I have lived here since 1907.

I was employed by the Federal Census Bureau to help make up the census rolls for Dall-s County in 1940.

The population of Dallas County in 1940 was 398,049.

There was no break down of approximately how many colored people residing in Dallas County in this office; however, for working purposes I made an estimate.

Whereupon the Co-nsel for the State, Mr. MacNicoll remarked:

By Mr. Jimmie MacNicoll: We object to any estimate, your Honor.

By the Court: Sustain it.

My Mr. Doss Harding (continuing examination):

No, I do not know of my own knowledge hos many there are, merely an estimate.

Yes, sir, just an estimate.

Yes, sir, that estimate is my own opinion.

Question: Well, what is that?

Whereupon the Counsel for the State Mr. MacNicoll remarked:

[fol. 94] By Mr. Jimmie MacNicoll: And we object to it.

By the Court: I sustained the objection to that.

CHARLES T. BRACKINS, called by the defendant, having first been duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Doss Hardin:

My name is Charles Brackins.

I am a colored man, and have lived in Dallas County for about 54 years, and I live in Dallas County now.

I am engaged in the insurance and bonding business.

Yes, I own some property in Dallas County.

I have paid my poll-tax.

I have not at any time, since I have lived in Dallas County, been called upon to serve on the grand jury.

Question: I will ask you to state whether or not you possess the necessary qualifications to serve on the grand jury?

Whereupon the Counsel for the State, Mr. MacNicoll remarked:

By Mr. MacNicoll: We object to that as calling for a conclusion on his part.

By the Court: I sustain the objection.

By Mr. Doss Hardin (continuing examination):

No, sir, I have never been called on to serve on the grand jury.

[fol. 95] No, sir, I do not know of any other colored man who has been called to serve on the grand jury in Dallas County.

Cross-examination.

By Mr. Dean Gauldin:

Yes, I have — called as a petit juror lots of times.

Whereupon the Counsel for defendant, Mr. Hardin, remarked:

By Mr. Hardin: We object to that, your Honor.
By the Court: Sustained.
By Mr. Dean Gauldin: State the question again.

G. F. Porter, called by the defendant, having first been duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Doss Hardin:

My name is G. F. Porter.
I have lived for twenty-five years in Dallas County, and do at this time.
I am a colored man.
I know many people here.
I own some property here in Dallas County.
I own my residence here.
I am 57 years old.
Yes, I paid my poll tax for the year 1940.
I don't remember the number of years I have been paying my poll tax in Dallas County.
I have owned property in Dallas County for about four years.
[fol. 96] No, sir, I have never been called to serve as a grand juror since living in Dallas County.
I do not know of any other colored people that have been called to serve on the grand jury in Dallas County.
Question: Do you know, of your own knowledge, the colored population of Dallas County?

Whereupon the Counsel for the State, Mr. MacNicoll, remarked:

By Mr. MacNicoll: Oh, we object to that your Honor, how would he know.
By the Court: Unless you counted them—don't guess at it.

Answer of the Witness: I have looked at the U. S. census.

Whereupon the Counsel for the State, Mr. MacNicoll, remarked:

By Mr. MacNicoll: We object to that.
By the Court: Sustained.

Cross-examination.

By Mr. Jimmie MacNicoll:

I presume I know all the qualifications of a grand juror.

Whereupon the Counsel for the defendant, Mr. Hardin, remarked:

By Mr. Hardin: We object to that; he says he had never been called.
[fol. 97] By the Court: I don't believe you can ask that; Sustain that.

CHARLES A. PIPPEN, called by the defendant, having first been duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Doss Hardin:

My name is Charles A. Pippen.
I live in Dallas County.
I have lived in Dallas County about 27 or 28 years.
I am now serving as Assistant District Attorney of Dallas County.
Yes, during my 27 or 28 years in Dallas County I have held public office.
Well, I have been Criminal District Judge, and Assistant District Attorney two or three times.
I have served this county as Criminal District Judge sixteen years.
I served for sixteen years as the Judge of this Court.
Question: Now during your sixteen years service as Criminal District Judge in this County, do you know whether or not you ever had a negro on one of the grand juries?

Whereupon the Counsel for the State, Mr. MacNicoll remarked:

By Mr. MacNicoll: We object.
By the Court: Answer.

By Mr. Doss Hardin (continuing examination):

I never did.

[fol. 98] Cross-examination.

By Mr. Jimmie MacNicoll:

I do not have anything to do, personally, with the selection of any grand jury.

All I ever did was to give the Commissioners their instruction- provided by law.

Those instructions were—usually I took the statutes and read the qualifications; there are several qualification- a man must possess to become a grand juror; and I told them to get men that they knew personally, if they could, that possessed those qualifications, men with good moral character, not under indictment, not previously convicted of a felony, qualified voters who had paid their poll tax, to sit on the grand jury; those are some of the qualifications.

During my entire tenure of office, I don't know if I ever heard of any complaint or not about negroes being discriminated agasinst in this county, this is the first formal one.

Question: Do you know of your own knowledge whether or not the negro has been discriminated against in that respect?

Whereupon the Counsel for the defendant, Mr. Hardin, remarked.

By Mr. Hardin: Object.
By the Court: Sustained.

C. R. Graggs, called by the defendant, having first been duly sworn, testified as follows, towit:

Direct examination.

By Mr. Doss Hardin:

[fols. 99-107] My name is C. R. Graggs.

I am a colored man.

I have lived in Dallas County about 25-years and I here now.

I own property in Dallas County.

I own five houses here.

Yes. I own five pieces of property—five houses.

I have owned that property about 20 years.

I paid my poll tax during the year 1940.

I do not know how long I have been paying my poll-tax in Dallas County, a number of years.

During all that number of years that I were a property owner in this county and paid poll-tax, I have never been called to serve as a grand juror.

I do not recall of any other colored people that have been.

[fol. 108] The witness, Ed Cobb, called by the defendant, having first been duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Doss Hardin:

My name is Ed Cobb. I am the Assessor and Collector of Taxes for Dallas County.

I have held that position since January 1st, 1935.

Yes, I know, of my own knowledge, the approximate number of poll-taxes paid in Dallas County last year, 1940.

I do not definitely know of my own knowledge how many colored people paid poll-taxes in 1940.

Whereupon Counsel for State, Mr. MacNicoll, remarked:

By Mr. MacNicoll: Then we object to any testimony on it.

Whereupon the Court remarked:

By the Court: Go ahead.

[fol. 109] By Mr. Hardin (continuing examination):

I have not checked, you know, definitely.

I do not know definitely the exact number how many white people paid their poll-tax for last year,—just about.

I know just about the number of white—around 58,000, about 8,000 colored.

Cross-examination.

By Mr. Jimmie MacNicoll:

Question: You don't know, or do you, how ma-y qualified negroes there are in Dallas County to serve on the grand jury?

Whereupon Mr. Hardin remarked:

By Mr. Doss Hardin: We object to that, calls for a conclusion.

Whereupon Mr. MacNicoll remarked:

By Mr. MacNicoll: I ask him if he knows.

Whereupon the Court remarked:

By the Court: If he knows he may state.

By Mr. MacNicoll (continuing examination):

Answer: The only thing I know is the approximate number who have poll tax receipts.

Question: But you don't know how many can read and write, or how *amny* are women,—you don't know that?

Answer: No.

The witness, Robert Gregory, called by the defendant, having first been duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Doss Hardin:

My name is Robert Gregory.

[fol. 110] Whereupon Mr. Joe Cunningham remarked:

By Mr. Joe Cunningham: Your Honor, this witness has been in the Courtroom and the witnesses are under the rule. May I take him on voir dire?

Whereupon the Court remarked:

By the Court: Go ahead.

Voir dire examination:

By Mr. Joe Cunningham:

My name is Robert Gregory.
I have been in the Courtroom about ten minutes.
I heard the testimony of some of these witnesses.

Whereupon Mr. Joe Cunningham remarked:

By Mr. Joe Cunningham: We will object to any testimony by this witness.

Whereupon the Court remarked:
By the Court: Who did you hear testify?

I believe I heard Mr. Graggs testify. That was the colored man. I heard the man say he was Assistant District Attorney. Yes, Judge Pippen. Yes,—and the County Tax Collector—Mr. Cobb.

Whereupon the Court again remarked:

By the Court: Overruled the objection; go ahead.

Direct examination (Cont'd).

By Mr. Doss Hardin:

My name is Robert Gregory.
I live at 2417 Allen.
Here in Dallas, I am employed by the Dallas Express.
That is a colored newspaper published.
It is made up here; it is a part of a newspaper chain, it is published in Houston.
I have been employed there about 4 months.
During that 4-months time I have had occasion to make a [fol. 111] survey of the colored population of Dallas County as near as we possibly could.
We have had an intensive advertising compaign and circulation campaign on.

Whereupon Mr. Cunningham remarked:

By Mr. Cunningham: Object you- honor, that would be no evidence.

Whereupon the Court remarked:

By the Court: Overruled you so far.

By Mr. Hardin (continuing examination):

I have made a survey in greater Dallas, I think as to the population of the colored people residing in Dallas County.

Whereupon the Court remarked:

By the Court: Answer the last question; he asked you if you had made any actual survey?

By Mr. Hardin (continuing examination):

I made a survey, personally, as to the approximate colored population of Dallas County.

Question: What did you find the colored population in Dallas County to be?

Whereupon the Court remarked:

By the Court: You are not going by what someone reported to you now, but what you know of your own knowledge, the ones you counted or saw and talked to, but not what you found out from what someone told you or what you suppose.

Answer: From what I know of my own knowledge there — about 55,000 negroes in Dallas.

Cross-examination.

By Mr. Jimmie MacNicoll:

Question: That is just a guess on your part isn't it? [fol. 112] Answer: No, it isn't; I contacted the Chamber of Commerce.

Whereupon Mr. MacNicoll remarked:

By Mr. MacNicoll: Now, your Honor, we object to what the Chamber of Commerce may have told him.

Whereupon the Court remarked:

By the Court: Sustain it. Did you count those people yourself?

Question: No, I could not do that.

By the Court: Now, that's what I told you not to answer; if your survey is just based on what people told you, if that is what your answer is based on, that 55,000 I will strike it out, but if you know you may state.

Answer: All the knowledge I have—no one seems to know definitely.

By the Court: Where did you get your information?

Answer: From the Chamber of Commerce.

By the Court: Strike that testimony out.

Redirect examination.

By Mr. Doss Hardin:

I solicit subscriptions to the Dallas Express.

I contact people every day in doing that.

The city circulation in Dallas is——

Whereupon Mr. MacNicoll remarked:

My Mr. MacNicoll: Unless he shows that he knows, we object.

Whereupon the Court remarked:

By the Court: Are you talking about general circulation; that goes to white peolpe, japanese, chinamen or what? I really don't see the purpose of the circulation of that paper—let's get to that first.

By Mr. Doss Hardin (continuing examination):

[fol. 113] In soliciting subscriptions to the Dallas Express I contact colored people and ask them to subscribe to the paper. And I have been doing that for four months.

Yes, contact them every day, along with the rest of the members of the staff; there are six of us.

What I say I base my opinion on that there are 55,000 colored people in Dallas County,—it is based on the knowledge I have gained through my work on this paper.

Recross examination.

By Mr. Jimmie MacNicoll:

Yes, in my estimate I am talking about women and children and everybody.

A am talking about all of them, including babies.

Yes, that—correct,—the population.

No, I don't know the number as to the men who are qualified voters, ones who can read and write.

The witness, MRS. PEARL SMITH, called by the defendant, having first been duly sworn, testified as follows, towit:

Direct examination.

By Mr. Doss Hardin:

My name is Pearl Smith.

It is Mrs. Pearl Smith.

I hold an official position in Dallas County.

District Clerk.

I have been District Clerk since January 1st, 1939.

No, we haven't issued any citations for negroes to serve on the grand jury of this county that I know of.

I wouldn't know.

No, I wouldn't know if I had of not, I couldn't tell by the name.

[fol. 114] Yes, sir, all I know them is the names.

That is correct, if there have been any negroes on the grand jury I don't know it.

Cross-examination.

By Mr. Jimmie MacNicoll:

Yes, I could have known.

Yes, sir, I go strickly according to the names of the men.

By Mr. Doss Hardin: That is all the evidence we have to present on this motion, your Honor.

Whereupon Mr. Gauldin remarked:

By *the* Mr. Gauldin: We have a stipulation you- Honor for the record.

Whereupon the Court remarked:

By the Court: Dictate it to the Reporter.

Whereupon Mr. Gauldin dictated the following stipulation:

STIPULATION

By Mr. Gauldin: It is admitted by the attorneys representing the State of Texas and Counsel represneting the defendant, that the Grand Jury which indicted this defendant for the offense charged therein was impaneled on

the first Monday of October, 1940, and that the date the alleged offense was committed was the firs- day of December, 1940, some sixty days after the im-aneling of the said Grand Jury, and that the indictment against this defendant in this case was returned into this Court on December 3rd, 1940.

ORDER OVERRULING MOTION TO QUASH INDICTMENT

And, the Court overruled defendant's said motion, refusing to quash said indictment and forced the defendant to trial at said time, and to which action abd ruling of the court the defendant then and there duly excepted and presentes this his Bill of Exception No. 1 ans asks that [fols. 115-118] same be approved as true, signed and filed as a part of the record of this case.

(Signed) Doss Hardin, Attorney for defendant.

[File endorsement omitted.]

[fol. 119] IN CRIMINAL DISTRICT COURT NO. 2, DALLAS COUNTY, TEXAS

ORDER APPROVING BILL OF EXCEPTION NO. 1

The defendant upon this Motion to Quash the indictment offered three negroe witnesses, to wit: Charles T. Brackins, G. F. Porter and C. R. Graggs, and each of these witnesses testified that they owned real estate in Dallas County, Texas, and had paid their poll tax for the year 1940, and that is all with reference to their qualifications as grand jurors. The defendant offered no proof whatever showing that these witnesses possessed the other qualifications for grand jurors as required by statute; that is, that they were able to read and write; that they had not been convicted [fol. 120] of a felony or under any other legal accusation for theft or any felony; or that they were sane and of good moral character. Neither did the defendant offer any proof showing these qualifications with reference to any other negroe residents of Dallas County, Texas.

The Court's attention is called to the testimony of Mr. Ed Cobb, who is the Assessor and Collector of Taxes for Dallas County, Texas, wherein he stated that he did not

know of his own knowledge how many colored people paid poll taxes in Dallas County in 1940, and that he had not checked definitely and made an estimate that about eight thousand colored people paid their poll taxes in Dallas County for the year 1940, and in addition to approximating the number of negroes who paid poll taxes in Dallas County for the year 1940 the witness stated that he did not know how many of those who paid poll taxes for the year 1940 could read and write or how many were women. This witness was not asked, neither did he state in his testimony how many of the colored race who paid poll taxes for 1940 were sane and of good moral character; how many were under indictment or how many had been convicted of felonies.

The witness, Robert Gregory, colored, was of the opinion that there were around fifty-five thousand colored people in Dallas County, Texas, but this opinion was based on hearsay and on what contacts he had had with the Chamber of Commerce and with the six men working on the paper with which he was connected.

In the Court's opinion, the testimony offered both as to the number of colored people residing within Dallas County and the number who had paid their poll taxes was indefinite [fols. 121-292] and uncertain and based upon opinion and estimation.

Taking into consideration the testimony of the three Grand Jury Commissioners and all the other testimony offered on this Motion, the trial court was of the opinion that to grant said Motion the Court would have to assume the unproven qualifications of the negroe witnesses offered and of other colored residents of this county, as well as the number of colored residents of Dallas County, and the Court did not feel like he should assume these facts.

This Bill of Exception was presented to the Court on April 29th, 1941, but inasmuch as the death penalty was assessed in this case the Bill is being approved and ordered filed.

With the above explanation and qualifications, the Defendant's Bill of Exception No. 1 is approved and ordered filed this the 20th day of May, 1941.

(Signed) Henry King, Judge, Criminal District Court, No. 2, Dallas County, Texas.

[fol. 293] IN COURT OF CRIMINAL APPEALS OF TEXAS

No. 21689

HENRY ALLEN HILL, Appellant,

v.

THE STATE OF TEXAS, Appellee

Appeal from Dallas County

OPINION—October 22, 1941

The conviction is for the offense of rape. The punishment assessed is death.

The record shows that on Saturday night, November 30, 1940, the prosecutrix and John S. Sanders were out riding in an automobile; that when they reached an underpass between Parkland Hospital and the football stadium in the City of Dallas they had to slow down the speed of their car to about fifteen miles per hour; that appellant jumped on the running board of their car, opened the door, hit Mr. Sanders on the head, jerked the switch key out of the car and told Sanders that if he did not let him have the girl he would blow his brains out. Mr. Sanders jumped from the car and ran around to the side thereof, where appellant was and a fight ensued. Appellant hit Sanders on the head with a rock, knocked him down and then caught the prosecutrix and began to pull off her clothes. Sanders again came to the woman's rescue but appellant again knocked him down with the rock, and while Sanders was lying on the ground unconscious, appellant jerked her clothes off until she was almost nude. He then knocked her down and by force had sexual intercourse with her. During all this time she was screaming for help and struggling with her assailant to prevent him from accomplishing his purpose, but without avail. About the time that appellant had accomplished his purpose, Mr. and Mrs. Kearns, and Mr. and Mrs. Gardner came along in an automobile. Seeing and hearing what was going on, they stopped and got out of their car to render whatever assistance they could. Appellant hesitated for a moment and then left, but during the struggle Sanders had torn a pocket from appellant's coat which contained his discharge from the penitentiary. Appellant was arrested the next

day just before noon and carried to the City Hall where he was identified by both Sanders and the prosecutrix. He made a voluntary confession admitting the assault but denying that he succeeded in raping the prosecutrix.

[fol. 294] Appellant contends that the court, in the trial of the case, committed seven errors, each of which requires a reversal of the judgment. We will consider and dispose of them in the order in which they are presented.

His first contention is that the court erred in declining to sustain his motion to quash the indictment based on the ground of alleged race discrimination in the selection of the grand jury. It is averred in his motion that he was of African descent and belonged to the negro race; that the jury commissioners, in the selection of grand jurors, deliberately and designedly discriminated against the members of his race in that they intentionally declined to select any negroes as members of the grand jury which returned the indictment against him. When his motion was presented the State contested the same and the court heard evidence on the subject. Mr. James O. Cherry, one of the jury commissioners who selected the grand jury, testified in substance as follows:

"In selecting the Grand Jury we selected what we thought were the best qualified men to serve. We discussed the best men available. I knew part of the Grand Jurors and the other Commissioners knew part of them and each one selected the men they knew personally to make up the Grand Jury. We did not select a negro. I did not know of one that was qualified. I made no investigation or inquiry as to whether there was a negro in Dallas County qualified to serve. The Judge gave us the instructions in regards to selecting the Grand Jury, but did not tell us to select a negro. We discussed the selection of a negro on the Grand Jury, but I didn't know a negro, personally, who was qualified. We did not arbitrarily discriminate against the negro race, and no one expressed any prejudice against the negro race in selecting the Grand Jury."

Mr. O. W. Cox, another jury commissioner, testified in substance the same as did Mr. Cherry. He said they carried out the instructions of the court to get the best men available without respect to race, color or creed.

Mr. H. W. Whisenant testified that he assisted in making up the census rolls for Dallas County for the year 1940; that the approximate population for the County was 398,049. [fol. 295] Charles T. Brackins, a negro, testified that he was engaged in the insurance and bonding business; that he owned property in Dallas County and paid his poll Tax; that he had never been called upon to serve on a grand jury nor did he know of any negro who had ever been called. C. R. Graggs, another negro, testified in substance as did Brackins.

Charles A. Pippen, testified that he had lived in Dallas County for 27 or 28 years; that he is now serving as Assistant District Attorney; that he had served as Judge of the Criminal District Court of Dallas County for a period of sixteen years, but never had a negro on the grand jury; that he always read the statutes to the jury commissioners; that there are certain qualifications a man must possess to become a grand juror; that is, he must be a man of good moral character, not under indictment, not previously convicted of a felony, must be a qualified voter, etc.

Appellant testified in substance that he was arrested for the offense of rape on December 1, 1940; that he requested the officers to let him go before the grand jury and talk to the grand jury commissioners about putting a negro on the grand jury; that he could read and write and said that the averments in his motion were true. He testified that he did not know whether or not he was in jail when the grand jury was empaneled; that he did not know when the grand jury was sworn in; that he asked the officers to take him before the grand jury when they were bringing him from the city hall; that he made no request to be taken before the grand jury after he was transferred from the city hall to the county jail.

The Assessor & Collector of Taxes for Dallas County testified that 58,000 white people and 8,000 negroes paid poll taxes in said county.

Robert Gregory, who was employed by the Dallas Express (a colored newspaper), testified that he had been in Dallas four months during which time he made a survey of the colored population of Dallas County; that it was his opinion that there were 55,000 negroes, including men, women and children. However, he did not know how many men could read and write or how many were qualified to serve as [fol. 296] grand jurors.

Mrs. Pearl Smith, District Clerk of Dallas County, testified that she had held that position since January 1, 1939; that she had never issued any summons for negroes to serve on the grand jury in the county so far as she knew.

It was admitted by the attorneys for the State and the Defendant that the grand jury which indicted appellant was empaneled on the first Monday in October, 1940, for a period of three months and that the offense was committed something like sixty days after the grand jury had been in session. Consequently the grand jury was in session at the time this offense was committed by the appellant.

Article 339, C. C. P., provides as follows:

"No person shall be selected or serve as a grand juror who does not possess the following qualifications:

1. He must be a citizen of the State, and of the county in which he is to serve, and qualified under the Constitution and laws to vote in said county; but, whenever it shall be made to appear to the court that the requisite number of jurors who have paid their poll taxes cannot be found within the county, the court shall not regard the payment of poll taxes as a qualification for service as a juror.

2. He must be a freeholder within the State, or a householder within the County.

3. He must be of sound mind and good moral character.

4. He must be able to read and write.

5. He must not have been convicted of any felony.

6. He must not be under indictment or other legal accusation for theft or of any felony."

These mandatory provisions of the statute, which are not deemed to be unfair, must be observed by the jury commission in the selection of the prospective grand jurors, and unless a person possesses the required qualifications he is not a competent and qualified grand juror.

In filing his motion to quash the indictment, appellant assumed the burden of sustaining his allegations by proof. He attempted to do so by showing certain facts from which, as he claims, such a conclusion could be reasonably drawn. He showed that 58,000 white persons and 8,000 negroes paid [fol. 297] poll taxes in Dallas County, but the record is

silent as to how many of them were male and how many were female persons; nor is it shown how many of these male persons could read and write; nor how many of them were freeholders in the state or house-holders in the county. Appellant called two of the jury commissioners as witnesses, each of whom denied any intention of excluding negroes from grand jury service. Both testified that each jury commissioner selected men from his community who were considered best suited and qualified to render the service imposed upon grand jurors by law. Moreover, it was agreed that the grand jury had been empaneled while appellant was still serving a sentence in the penitentiary and approximately sixty days before he committed the alleged offense. Hence, there could not have been any formed design or concerted action on the part of the jury commissioners to discriminate against him.

The trial court patiently heard all the testimony relative to the question presented and decided it adversely to the appellant's contention. We do not feel that under the evidence adduced upon the hearing thereof that we would be authorized or justified in setting aside the conclusion reached by the court on the facts as presented by the record. The question here presented has frequently been before this court. See Murphy v. State, 141 S. W. (2d) 634; Seals v. State, 139 S. W. (2d) 105; Hamilton v. State, 150 S. W. (2d) 395; King v. State, 152 S. W. (2d) 342. The Supreme Court of the United States has passed upon the question in several cases, particularly as far back as Thomas v. State of Texas, 212 U. S. 278; 53 L. Ed. 512; Martin v. State, 200 U. S. 316, and many other cases since that time. See also Mamaux v. United States, 264 Fed. Rep. 816; Beckett v. United States, 84 Fed. (2nd) 731; Ruthenberg v. United States, 245 U. S. 480, 62 L. Ed. 414.

It appears that some members of the Bar of this State have, from some source, gathered the impression that when a negro is indicted by a grand jury composed wholly of white men, it is sufficient proof to show race discrimination regardless of any proof that any member of such race possessed the required statutory qualifications for grand jury [fol. 298] service and consequently, he is entitled to have the indictment quashed. If that contention should be sustained, notwithstanding that negroes are citizens of the United States of America, then every person of Italian, Spanish, Russian, Mexican or German descent or any other

race, although citizens of the United States, would have the same right and privilege. If we should so hold, then a party belonging to either of the races mentioned, who committed an offense against the laws of this state, could not legally be indicted by a grand jury until at some subsequent term of court a grand jury could be drawn and empaneled upon which was some member of his race. Such a holding would not only tend to delay the trial of criminal cases but abrogate the constitutional provision guaranteeing to one accused of crime a speedy public trial. Whether or not race discrimination was practiced by a jury commission in the selection of prospective grand jurors is an issue of fact and must be established by the testimony with some degree of certainty to overcome the prevailing presumption that officers in the discharge of their official duties complied with the law. That jury commissioners are officers of the court within the purview of the law seems not even to be the subject of debate. The controlling question is not whether a member of the negro race should have been selected and empaneled as a member of the grand jury which indicted appellant, but whether the absence of a member of the negro race upon the grand jury resulted alone by reason of any race discrimination having been practiced against members of that race because of the fact that they were negroes. Having reached the conclusion that no such discrimination is here shown, his contention is overruled. We have written quite at length on this subject in the case of King v. State, 152 S. W. (2d) 342, where we have definitely and clearly expressed our opinion on the subject under consideration, and without reiterating our conclusions here we deem it sufficient to refer to that case.

Appellant next complains of the following remarks by the District Attorney in his opening argument to the jury:

"I say to you, gentlemen, that a snake crawls on his own belly but these human vultures crawl on the bellies of our helpless and defenseless women."

[fol. 299] Appellant objected to the remark on the ground that it constituted unsworn testimony; that the same was not warranted by the facts and was highly inflammatory and prejudicial. This bill is qualified by the court who states in his qualification that he sustained appellant's objection and instructed the jury to disregard the same. Ap-

pellant contends, however, that notwithstanding the court's instruction, the remark was of such a prejudicial nature that it could not be effectively withdrawn and erased from the minds of the jury. We are not in accord with appellant's contention. In the first place, it is common knowledge that a snake crawls on his belly; and it is also commonly known that men who, by force, overcome the resistance of helpless women and commit rape, crawl on the bellies of such women. Hence, the argument was not, in our opinion, the giving of unsworn testimony but a reasonable deduction from facts commonly known. See Fowler v. State, 118 Tex. Cr. R. 424.

By Bill of Exception No. 3 appellant complains of the following remark by the Assistant District Attorney:

"I submit you to check his motive (meaning the District Attorney of Dallas County) against those of the man who sits by that negro (referring to defendant's counsel) with his money jingling in his pockets that he had been paid to defend him."

Appellant objected to the argument on the ground that it was giving unsworn testimony, was prejudicial and was not supported by the record. In his qualification of the bill the court states that counsel for defendant in his argument to the jury severely criticized Will Fritz, Inspector of Detectives, and also the District Attorney, claiming that he (the District Attorney) was trying to establish a record by giving defendant the death penalty; that counsel objected to the use of the words by the Assistant District Attorney relative to "money jingling in his pockets"; that the court promptly sustained the objection and would have instructed the jury not to consider said remarks had such a request been made. It seems from the qualification of the bill, which appellant accepted, that the remarks were invited by appellant's counsel by attributing selfish motives to the District Attorney in the prosecution of the case. Appellant cannot complain of argument provoked or [fol. 300] invited by the conduct of his own counsel. See Calloway v. State, 92 Tex. Cr. R. 506; Sinclair v. State, 35 Tex. Cr. R. 130, and cases there cited. See also Morris v. State, 84 Tex. Cr. R. 100. The case of Gatlin v. State, 20 S. W. (2d) 431, to which appellant cites us, was affirmed by this court and does not sustain his contention of reversible error.

Bill of Exception No. 4 complains of the following remarks by the District Attorney in his argument to the jury:

"Look into the past record of defendant and determine whether he is a liar or a truthful witness."

No ground of objection is stated in the Bill. Hence we are unable to determine upon what ground he objected. We think that the argument was not improper in view of the fact that appellant, who testified in his own behalf, denied the act of rape, but admitted that he had theretofore been convicted twice of automobile theft. This testimony was admissible for the purpose of affecting his credibility as a witness. Consequently, the remark complained of was justified by the record.

In 45 Tex. Jur., p. 113, sec. 251, it is said:

"For the purpose of discrediting the witness, on cross-examination he may be questioned to elicit the fact that he has been legally charged with, indicted for, or convicted of a felony or any offense involving moral turpitude; and the witness may be compelled to answer such questions."

See Wright v. State, 103 Tex. Cr. R. 534; Minor v. State, 105 Tex. Cr. R. 189.

Bills of Exception Nos. 5 and 6 complain of certain argument made by the District Attorney. Each bill is qualified by the court and the qualification clearly shows that the argument complained of was invited by appellant's counsel. It appears to us that appellant's counsel was of the opinion that he could taunt the District Attorney and that he would have to sit there with his mouth closed and hands crossed and not make any reply.

By Bill of Exception No. 7 appellant complains of the following question propounded to him on cross-examination by the District Attorney:

"You were headed for the thickets because you knew that you had raped a white woman, didn't you, Hill?"

There was testimony by a number of witnesses that when [fol. 301] Mr. and Mrs. Kearns and Mr. and Mrs. Gardner stopped their car at the scene of the offense, appellant hesitated for a moment and then ran up the hill into the

brush. Hence, the question was legitimate cross-examination.

Appellant also complains of the court's action in overruling his motion for a new trial based on the ground that the jury rendered an illegal verdict in that the verdict returned by the jury was one by only eleven of the jurors and not a unanimous verdict by all twelve of the jurors who constituted the jury. The court heard evidence on the question presented. It appears from the record that when the jury retired to consider their verdict, they first voted on the question of appellant's guilt. The result of this vote showed that all of the jurors voted "guilty". They next voted on the penalty and the result showed that eight were for death, two for life and two for 99 years' imprisonment. Then, the next morning, after some further discussion of the evidence, another vote was taken and the result of this vote showed ten for the death penalty and two for 99 years. After further discussion among themselves, they took another ballot which showed eleven for the death penalty and one for 99 years' confinement in the penitentiary. Mr. Shelley, one of the jurors, did not believe that the panties offered in evidence were those worn by the prosecutrix; that he thought they were too small for a woman of her size. Mr. Dawson, one of the jurors, took off his trunks and compared them with the size of the garment which the girl was supposed to have worn at the time of the assault. After the garment was examined and compared, Mr. Shelley did not indicate that he declined to impose the death penalty. They then took another vote. Each Juror wrote on a slip of paper the penalty he wanted imposed on the defendant and dropped it into a hat. These ballots were then canvassed and the result showed that each juror voted for the death penalty. The verdict was accordingly written and signed by the foreman. Juror Shelley testified that on the question of guilt he voted "guilty" but he did not believe that the punishment should exceed five years' confinement in the penitentiary; that they discussed the case until after twelve o'clock and then retired for the night without having arrived at a verdict; that some of the jurors remarked that [fol. 302] they would stay there from then on if he did not agree with them. He further testified that he told the jurors that they would have to take the responsibility on themselves; that he did not write "death" on a piece of

paper and hand it to the foreman. He claims that he never voted for the death penalty. However, this was denied by the other members of the jury. He claimed further that when they came into the court room with the verdict and took their seats in the jury box and after the verdict had been read, the court inquired of each juror if that was his verdict; that he (Shelley) did not say anything or nod his head. He did not protest or advise the court that it was not his verdict. Every other juror testified that Shelley did vote for the death penalty. We are not favorably impressed with appellant's contention. A juror cannot impeach his verdict by subsequently repudiating his act; nor will he, under the circumstances here disclosed, be permitted thereafter to say that it was not his verdict when, after being asked if that was his verdict, he did not by word or sign indicate otherwise.

In the case of Weatherford v. State, 31 Tex. Cr. R. 530, this court, speaking through Judge Simkins, said:

"Upon grounds of public policy, courts have almost universally agreed upon the rule, that no affidavit, deposition, or other sworn statement of a juror, will be received to impeach a verdict, or to explain it, or to show on what grounds it was rendered and the wisdom of the rule needs no argument to support it."

This rule has been re-affirmed in the following cases: Bacon v. State, 61 Tex. Cr. R. 206; Gonzales v. State, 90 Tex. Cr. R. 238. Moreover, the evidence relative to the question here presented raised a controverted issue which the court decided adversely to appellant.

Finding no reversible error in the record, the judgment of the trial court is affirmed.

Krueger, Judge.

(Delivered Oct. 22, 1941.)

The foregoing opinion of the Commission of Appeals has been examined by the Judges of the Court of Criminal Appeals and approved by the Court.

[fol. 303] IN COURT OF CRIMINAL APPEALS OF TEXAS

No. 21689

HENRY ALLEN HILL, Appellant,

v.

THE STATE OF TEXAS, Appellee

Appeal from Dallas County

OPINION ON MOTION FOR REHEARING—Jan. 7, 1942

Appellant in his motion, in the main, merely reiterates the contentions originally presented herein, which are treated in the original opinion. However, he is much exercised relative to the statement therein that if followed out to its necessary conclusion as to the presence on the grand jury of a person of the same nationality as that of appellant, that such a practice would result in endless confusion, and oftentimes in a discrimination against the State and *in favor of* the appellant. He arbitrarily classifies the nationalities that inhabit these states of ours under the color line into red, yellow, black and white, and overlooks the fact that these broad distinction of colors have many and varied subdivisions within themselves that are inimical to each other, not only in their habits and characteristics but in their creeds, beliefs and associations. We find nothing in the Fourteenth Amendment relative to color or race or creed. These words are not mentioned therein. The portion thereof herein contended to have been violated reads as follows:

"* * * Nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

One of the latest definitions of what is a denial of "due process of law" is found in the case of Lisenba v. California, Vol. 86, L. ed., p. 189, Adv. Sheets No. 3, in which the Supreme Court of the United States, speaking through Justice Roberts, said:

"As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential

to the very concept of justice. In order to declare a denial of it, we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevent a fair trial."

Under this definition, let us see whether the failure to have a person of the negro race on the grand jury that indicted appellant could have had any influence or effect upon his trial, leaving for the time being the question of a [fol. 304] discrimination in the selection of the grand jury. The grand jury that indicted appellant for this offense had been drawn and organized about sixty days prior to the date of the commission of the alleged offense. This offense herein complained of could not possibly have been known or been in contemplation at the time of the drawing of the grand jury by the commissioners, nor at the time of the grand jury being impaneled as such, and we are at a loss to see how such proceedings could have "unfairly infected this trial." True it is, there were no negroes on this grand jury, but it is also true that the jury commissioners stated in their testimony that they knew of no negroes that possessed the qualifications set forth in the statute relative to grand jurors, these statutorily demanded qualifications being set forth in the original opinion herein, and being Art. 339, C. C. P.

It should be evident from a perusal of this statute that of a necessity a jury commissioner should have some knowledge of the qualifications of a person selected as a grand juror in order to follow out the mandates thereof. They could not have fairly based their selection upon a grand juror with whose qualifications they had no acquaintance, and it is to be noted that they stated they did not know any negro who possessed such statutorily required qualifications.

There is also offered to us as a reason to show discrimination against appellant the fact that for many years there had been no negro selected by the jury commissioners of such county to serve on the grand jury in Dallas County, and therefore such failure alone was evidence of a discrimination in the present instance against appellant because of his color. We are not herein given the privilege of hearing from such prior jury commissioners; they were not utilized in this hearing; but we are in possession of

the testimony of two present jury commissioners, and we are at a loss to perceive any error in the method that they pursued in the selection of the names of persons to be used as a grand jury. Shall it be said to be their duty to select persons with whose qualifications they are not familiar merely in order to see that some person of the negro race might have a representative in color upon a grand jury [fol. 305] that might be called upon to return an indictment for an offense, possibly as in the instant case, not even as yet committed? If such be demanded, then what should the ratio be as between the white and colored races? If such be demanded of jury commissioners, would not such be a discrimination in appellant's favor, and surely such as is not required of such commissioners.

Again, we are unable to see how or in what manner the failure of commissioners to place negroes on previous grand juries throughout the years should raise so strong a presumption as to override the sworn statements of the jury commissioners who selected the grand jury in the present instance.

Reverting to Justice Roberts' definition of due process, we are interested in the proposition as to how the failure of the jury commissioners to place a negro on the grand jury in this instance could have "fatally infected the trial" of appellant. Could it be said with any degree of fairness that any grand jury, no matter what its complexion nor aggregate nationality, would have failed to be impressed with the testimony found in this record to such an extent as to say that this appellant should not have been presented in court for this alleged offense? If not, then the element of due process passes out of this case, there being no complaint relative to the petit jury that passed upon appellant's guilt. Unless their lack of due process affected the finding of the indictment to such an extent that one would not have been found, then there has been no failure of the due process of law. We think the proven facts clearly demonstrate the fact that the failure of the presence of negroes on the present grand jury was not the cause of the return of this indictment, but that a grand jury composed of any or all nationalities or colors would probably have acted in the same manner as was done in this instance.

Is it evident or even probable that the failure to present one or many negroes on the grand jury venire resulted

in an unfair trial that culminated in this verdict of guilt? Had a negro been present on the grand jury, is it even probable that a different verdict than that of guilt would have ensued?

Under the laws of our State and those of the United [fol. 306] States we think appellant has been accorded a fair trial, as the doctrine of fairness and justice appears to us.

We think the further questions presented to us in this motion have been properly decided in our original opinion, to which views we still adhere. Thus believing, the motion is overruled.

Graves, Judge.

(Delivered January 7, 1942.)

[fol. 307] Clerk's Certificate to foregoing transcript omitted in printing.

Endorsed on Cover: In forma pauperis. File No. 46,447, Texas, Court of Criminal Appeals, Term No. 1119. Henry Allen Hill, Petitioner, vs. The State of Texas. Petition for a writ of certiorari and exhibit thereto. Filed April 7, 1942. Term No. 1119 O. T. 1941.

SUPREME COURT OF THE UNITED STATES.

No. 1119.—October Term, 1941.

Henry Allen Hill, Petitioner, *vs.* The State of Texas. } On Writ of Certiorari to the Court of Criminal Appeals of the State of Texas.

[June 1, 1942.]

Mr. Chief Justice Stone delivered the opinion of the Court.

Petitioner, a negro, was indicted for the crime of rape by the grand jury for Dallas County, Texas. When the case was called for trial he submitted to the court his verified written motion to quash the indictment because he had been denied the equal protection of the laws guaranteed by the Fourteenth Amendment. The grounds of his motion were that negroes had been excluded from the grand jury which returned the indictment, and that the jury commissioners and other state officers charged with the duty of organizing and impanelling grand juries in Dallas County have for many years systematically excluded and in this case did exclude negroes from the grand jury because of their race.

After hearing evidence the court denied the motion and proceeded with the trial, which resulted in a verdict and judgment of conviction. The Texas Court of Criminal Appeals upheld the trial court's ruling on the motion and affirmed the judgment. — Tex. Cr. —; 157 S. W. 2d 369. It held that petitioner had not sustained the burden of proof resting on him to show that the failure to select negroes for service on the grand juries in Dallas County was because of their race rather than their lack of statutory qualifications for grand jury service. We granted certiorari, 316 U. S. —, to inquire whether the court's ruling is consonant with our decisions in *Neal* v. *Delaware*, 103 U. S. 370; *Pierre* v. *Louisiana*, 306 U. S. 354; and *Smith* v. *Texas*, 311 U. S. 128.

Article 339 of the Texas Code of Criminal Procedure provides that a grand juror must be a citizen of the state and county, qualified to vote there, a freeholder within the state or a householder within the county, of sound mind and good moral character, able to read and write. He must not have been convicted of a felony or be under indictment or other legal accusation of any felony.

The section directs that "whenever it shall be made to appear to the court that the requisite number of jurors who have paid their poll taxes cannot be found within the county the court shall not regard the payment of poll taxes as a qualification for service as a juror".

In rejecting the proof of discrimination on which petitioner relied, the Texas Court of Criminal Appeals said "appellant assumed the burden of sustaining his allegations by proof. He attempted to do so by showing certain facts from which, as he claims, such a conclusion could be reasonably drawn. He showed that 58,000 white persons and 8,000 negroes paid poll taxes in Dallas County; but the record is silent as to how many of them were male and how many were female persons; nor is it shown how many of these male persons could read and write; nor how many of them were freeholders in the state or householders in the county". And the State argues here that in these circumstances there can be no inference that long-continued failure of the county officials to select members of the colored race to serve on grand juries is discriminatory, without proof that there are members of that race living in the county who are qualified to serve as grand jurors.

The state filed a general denial of petitioner's motion, but submitted no answering affidavits, and called no witnesses, and so the only question before us is whether petitioner made out a prima facie case of the discriminatory exclusion of negroes from the grand jury. Petitioner called as witnesses two of the three grand jury commissioners, whose duty it is to summon sixteen men, of whom twelve are selected for service on each grand jury in Dallas County (articles 338, 357). They testified that the commission had summoned, for service on the grand jury which returned the indictment, members of the white race with whom they were acquainted and whom they knew to be qualified to serve. They testified that members of the commission had no prejudice against the colored race; that they discussed the possibility of selecting negroes to serve, and that they knew negroes in the county. One testified: "I personally did not know of a qualified negro that I thought would make a good grand juror". The other testified he did not know which of the negroes of his acquaintance could read and write. Both testified that they made no investigation or inquiry to ascertain whether there were negroes in the county qualified for grand jury service.

An assistant district attorney for the county, who had lived in Dallas County for twenty-seven or twenty-eight years and had served for sixteen years as a judge of the criminal court in which petitioner was tried and convicted, testified that he never knew of a negro being called to serve on a grand jury in the county. The district clerk of the county, whose duty it is to certify the grand jury list to the sheriff (article 344), knew of no citations issued for negroes to serve upon the grand jury. A colored witness, a property owner and poll tax payer in Dallas County, engaged in the insurance and bonding business, and resident in the county for fifty-four years, testified that he had often been called to serve as a petit juror but had never known of any colored man to be called as a grand juror. Two other colored witnesses, property owners and poll tax payers, who had lived in the county for twenty-five years, had never known of a negro to be called on a grand jury. There was also evidence already mentioned which the Texas Court of Criminal Appeals found sufficient to show that of the 66,000 poll tax payers in the county 8,000 were negroes.

Another witness estimated the total negro population of the county as 55,000. Actually this was an underestimate, for the 1940 census shows the total population of the county to be 398,564 of whom 61,605 are negroes, and of these 19,133 are males twenty-one years old or more. The census of 1930 showed only 7.5 per cent of the negro population of the county to be illiterate. The census data of 1940 show that of the 17,263 male negroes in the county who were twenty-five years of age or more, 16,107 had attended grade school or higher institutions of learning. Of these 7,979 had attended grade school from five to eight years; 1,970 had attended high school from one to three years, and 1,124 for four years; 466 had attended college from one to three years, and 284 for four years or more.

We think petitioner made out a prima facie case, which the state failed to meet, of racial discrimination in the selection of grand jurors which the equal protection clause forbids. As we pointed out in *Smith v. Texas, supra*, 131, chance or accident could hardly have accounted for the continuous omission of negroes from the grand jury lists for so long a period as sixteen years or more. The jury commissioners, although the matter was discussed by them, consciously omitted to place the name of any negro on the jury list. They made no effort to ascertain whether there were within the

county members of the colored race qualified to serve as jurors, and if so who they were. They thus failed to perform their constitutional duty—recognized by § 4 of the Civil Rights Act of March 1, 1875, 8 U. S. C. § 44, and fully established since the decision in 1881 of *Neal* v. *Delaware*, *supra*—not to pursue a course of conduct in the administration of their office which would operate to discriminate in the selection of jurors on racial grounds. Discrimination can arise from the action of commissioners who exclude all negroes whom they do not know to be qualified and who neither know nor seek to learn whether there are in fact any qualified to serve. In such a case discrimination necessarily results where there are qualified negroes available for jury service. With the large number of colored male residents of the county who are literate, and in the absence of any countervailing testimony, there is no room for inference that there are not among them householders of good moral character, who can read and write, qualified and available for grand jury service.

More than sixty years ago, in *Neal* v. *Delaware*, *supra*, 397, a case substantially like the present, this Court laid down the rule which we think controlling here:

"The showing thus made, including as it did, the fact (so generally known that the court felt obliged to take judicial notice of it) that no colored citizen had ever been summoned as a juror in the courts of the State,—although its colored population exceeded twenty thousand in 1870, and in 1880 exceeded twenty-six thousand, in a total population of less than one hundred and fifty thousand,—presented a prima facie case of denial, by the officers charged with the selection of grand and petit jurors, of that equality of protection which has been secured by the Constitution and laws of the United States. It was, we think, under all the circumstances, a violent presumption which the State court indulged, that such uniform exclusion of that race from juries, during a period of many years, was solely because, in the judgment of those officers, fairly exercised, the black race in Delaware were utterly disqualified, by want of intelligence, experience, or moral integrity, to sit on juries."

And recently we held in *Pierre* v. *Louisiana*, *supra*, that a prima facie case of race discrimination had been established where there had been a long-continued failure to select colored citizens for service on grand juries in a county, 50 per cent of whose population, or approximately 7,000, were colored, of whom from 70 to 80 per cent were shown to be literate. We thought as we think here that had there been evidence obtainable to contradict the inference

to be drawn from this testimony, the state would not have refrained from introducing it, and that the evidence which was introduced sufficiently showed that there were colored citizens of the county qualified and available for service on the grand jury.

A prisoner whose conviction is reversed by this Court need not go free if he is in fact guilty, for Texas may indict and try him again by the procedure which conforms to constitutional requirements. But no state is at liberty to impose upon one charged with crime a discrimination in its trial procedure which the Constitution, and an Act of Congress passed pursuant to the Constitution, alike forbid. Nor is this Court at liberty to grant or withhold the benefits of equal protection, which the Constitution commands for all, merely as we may deem the defendant innocent or guilty. *Tumey* v. *Ohio*, 273 U. S. 510, 535. It is the state's function, not ours, to assess the evidence against a defendant. But it is our duty as well as the state's to see to it that throughout the procedure for bringing him to justice he shall enjoy the protection which the Constitution guarantees. Where, as in this case, timely objection has laid bare a discrimination in the selection of grand jurors, the conviction cannot stand because the Constitution prohibits the procedure by which it was obtained. Equal protection of the laws is something more than an abstract right. It is a command which the state must respect, the benefits of which every person may demand. Not the least merit of our constitutional system is that its safeguards extend to all—the least deserving as well as the most virtuous.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.